PAN GLOBAL TEXTILES BHD PULAU PINANG

v.

ANG BENG TEIK

FEDERAL COURT, KUALA LUMPUR
WAN ADNAN ISMAIL CJ (MALAYA)
MOHAMED DZAIDDIN FCJ
AHMAD FAIRUZ FCJ
[CIVIL APPEAL NO: 02-11-1997(P)]
10 SEPTEMBER 2001

LABOUR LAW: *Employment - Absence from work without permission - Whether justifies dismissal*

LABOUR LAW: *Employment - Instructions from superiors - Proper course of action an employee should take if instructions not lawful and unreasonable - Whether disobedience can justify dismissal*

LABOUR LAW: *Employment - Dismissal - Whether failing to report for work after demotion can justify dismissal*

LABOUR LAW: *Employment - Dismissal - Dismissal of employee for failing to report for work after demotion based on misconduct - Whether dismissal without just cause and excuse - Failure of employer to hold an inquiry - Whether additional information would be gathered from such inquiry - Whether misconduct of employee clear and unambiguous - Whether proper forum to raise issue of demotion would be the Director-General of Industrial Relations - Whether attitude of indifference by employee justified dismissal*

LABOUR LAW: *Employment - Dismissal - Employee's representations to Director-General of Industrial Relations that dismissal without just cause and excuse - Whether representations made within sixty days of dismissal under s. 20(1) Industrial Relations Act 1967 - When time began to run under s. 20(1) - When dismissal took effect - Whether upon employee's failure to report for work after demotion or upon his subsequent receipt of dismissal letter*

LABOUR LAW: *Employment - Dismissal - When dismissal took effect - Whether upon employee's failure to report for work after demotion or upon his subsequent receipt of dismissal letter - Industrial Relations Act 1967, s. 20*

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Decision of Industrial Court on dismissal without just cause and excuse - Failure to consider relevant authorities - Whether an error of law - Whether grounds for judicial review*

The respondent was the General Manager of the appellant's office in Penang. He was suspended by the appellant pending allegations of misconduct against him. A domestic inquiry found him guilty of eight of the said allegations. The respondent was not dismissed. Instead, he was demoted and was told to report for work. The respondent objected to his demotion and did not report for work for 35 days which resulted in a dismissal letter by the appellant. The respondent then made representations to the Director-General of Industrial Relations and contended that he was dismissed without just cause and excuse. The matter was referred to the Industrial Court which held in favour of the respondent. The appellant then applied for *certiorari* against the decision of the Industrial Court and that was granted by the High Court. However, the respondent's appeal against the decision of the High Court was allowed by the Court of Appeal. Hence, the appellant's appeal to this court.

The issues were: (1) whether the respondent's representations to the Director-General of Industrial Relations were made within sixty days of his dismissal pursuant to s. 20(1) of the Industrial Relations Act 1967 ('IRA'); (2) whether time began to run under s. 20(1) upon the respondent's failure to report for work after demotion or upon his subsequent receipt of the dismissal letter; and (3) whether the Industrial Court had considered the relevant authorities before arriving at its decision.

Held:
Per Ahmad Fairuz FCJ

[1] It is generally held that the proper course for an employee is to obey the orders when it is given and protest about its illegality in separate proceedings. The distinction is made on the basis that if a worker is allowed to judge the legality of every order and to disobey it if he thinks it is not legal, it would be impossible for the management to get the work done. If an employee takes upon himself to disobey an order which he thinks not lawful or unreasonable, two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried, he can do the work and take up the matter with the union. If he disobeys he must take the risk, if the court finds that the order was lawful and reasonable. When a worker refuses to comply with the instructions of his superiors and his defence is that he wants to verify whether the order is approved by the Manager, this amounts to insubordination and dismissal is justified. This principle also applies to transfer orders. (BR Ghaiye on *Misconduct in Employment*). (p 197 d-g)

[1a] If an employee tries to disobey an apparently lawful order on the ground of illegality it will be difficult for the management to maintain discipline and industrial peace. It is the duty of the employee to first obey the order and then challenge it (BR Ghaiye on *Misconduct in Employment*). (p 197 g)

[2] No employee can claim as a matter of right leave of absence without permission and when there might not be any permission for the same. Remaining absent without any permission is gross violation of discipline. Hence, continued absence from work without permission will constitute misconduct justifying the discharge of a workman from service (OP Malhotra on *The Law of Industrial Disputes*). (pp 197 i & 198 b)

[3] The respondent's conduct entitled the appellant to dismiss him. The appellant terminated the contract of employment with the dismissal letter dated 6 June 1989. It was then that the respondent considered himself dismissed without just cause and excuse. The dismissal was within s. 20(1) IRA 1967. Therefore, time under s. 20(1) IRA begun to run from 6 June 1989. Consequently, the representations to the Director-General of Industrial Relations received on 21 July 1989 were made within the sixty days of dismissal as required under s. 20(1). (p 198 c-d)

[4] The court agreed with the learned High Court judge that the appellant's failure to conduct an inquiry into the misconduct of the respondent in not reporting to work was not fatal as no additional information would be gathered from the inquiry and the decision would have been the same as the misconduct of the respondent was clear and not unambiguous. The learned High Court judge had also rightfully held that the proper forum to raise the issue of demotion would be the Director-General of Industrial Relations pursuant to s. 20(1) IRA. Also, that the respondent had adopted an attitude of indifference and the action of the appellant was justified in the circumstances. Otherwise, all employees will stay away from work to win their demand, whether valid or invalid, and yet tie the hands of the employer from taking any action without being accused of having dismissed the employee from his employment. (p 199 b-f)

[5] The Industrial Court did not indicate its awareness of the relevant authorities, in particular the excerpts from BR Ghaiye's *"Misconduct in Employment"* and OP Maholtra's *"The Law of Industrial Disputes"*. Therefore, the Industrial Court had committed an error of law. It was also obvious that the findings of the Industrial Court went against law, logic and reason. In *Ernesty Sdn Bhd v. Transport Workers Union & Anor,* it was held that if there is an error of law on which the award of the Industrial Court is founded, such error, whether of interpretation

or otherwise, must necessarily be without jurisdiction or in excess of jurisdiction. In *R Rama Chandran v. Industrial Court of Malaysia & Anor,* it was held that a decision can be open to judicial review if it is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. In *Malayan Banking Bhd v. Association of Bank Officers,* it was held that the question of unreasonableness was in regard to decisions, when looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them. Based on the above, the court found the decision of the Industrial Court to be so devoid of any plausible justification that no reasonable body of persons could have reached it. As such, the court was left with no alternative except to confirm the orders made by the learned High Court judge. (pp 199 f-i, 200 a-h & 201 a-i)

[Appeal allowed; deposit refunded to appellant.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden adalah Pengurus Besar bagi pejabat perayu di Pulau Pinang. Beliau telah digantung kerja oleh perayu sementara menantikan penyelesaian dakwaan salah laku terhadap beliau. Satu siasatan domestik telah mendapati beliau bersalah atas lapan daripada dakwaan-dakwaan tersebut. Responden tidak diberhentikan kerja. Sebaliknya, beliau telah diturunkan pangkat dan diberitahu supaya melaporkan diri untuk bekerja. Responden membantah terhadap penurunan pangkat beliau dan tidak melaporkan diri untuk bekerja selama 35 hari yang menyebabkan surat pemecatan dikeluarkan oleh perayu. Responden kemudiannya membuat representasi-representasi kepada Ketua Pengarah Perhubungan Perindustrian dan menegaskan bahawa beliau telah dipecat tanpa kausa dan alasan yang adil. Perkara tersebut telah dirujuk kepada Mahkamah Perusahaan yang membuat keputusan menyebelahi responden. Perayu kemudian memohon untuk mendapatkan *certiorari* terhadap keputusan Mahkamah Perusahaan dan itu telah diberikan oleh Mahkamah Tinggi. Walaubagaimanapun, rayuan responden terhadap keputusan Mahkamah Tinggi telah dibenarkan oleh Mahkamah Rayuan. Maka, rayuan perayu kepada mahkamah ini.

Isu-isunya adalah: (1) sama ada representasi-representasi responden kepada Ketua Pengarah Perhubungan Perindustrian telah dibuat dalam tempoh enam puluh hari daripada pemecatan beliau selaras dengan s. 20(1) Akta Perhubungan Perindustrian 1967 ('IRA'); (2) sama ada masa mula berjalan di bawah s. 20(1) setelah responden gagal untuk melaporkan diri untuk kerja selepas penurunan pangkat atau setelah beliau menerima surat pemecatan; dan (3) sama ada Mahkamah Perindustrian telah mempertimbangkan otoriti-otoriti yang berkenaan sebelum mencapai keputusannya.

Diputuskan:
Oleh Ahmad Fairuz HMP

[1] Ianya secara umum diputuskan bahawa jalan yang betul bagi seseorang pekerja ialah untuk mematuhi perintah-perintah ketika diberikan dan membantah mengenai ketaksahannya di dalam prosiding yang berasingan. Perbezaannya dibuat atas dasar bahawa jika seseorang pekerja dibenarkan untuk memutuskan mengenai keesahan setiap perintah dan tidak mematuhinya jika ianya berfikiran perintah itu tidak sah, ianya sukar untuk pihak pengurusan melaksanakan kerjanya. Jika seseorang pekerja enggan mematuhi sesuatu perintah yang dianggapkannya tidak sah atau tidak munasabah, dua jalan terbuka kepadanya. Beliau haruslah menyatakan kesukaran yang dihadapinya, jika ada, kepada pegawai atasan dan jika pegawai tersebut mendesak supaya perintah itu dilaksanakan, beliau boleh melaksanakannya dan mengemukakan perkara tersebut kepada Kesatuan Sekerja. Jika beliau tidak mematuhinya, beliau mestilah mengambil risikonya, jika mahkamah memutuskan bahawa perintah itu sah dan munasabah. Apabila seseorang pekerja enggan untuk mematuhi arahan-arahan pegawai-pegawai atasannya dan pembelaan beliau adalah bahawa beliau hendak menentusahkan sama ada perintah tersebut diluluskan oleh Pengurus, ini adalah keingkaran dan pemecatan adalah wajar. Prinsip ini juga terpakai kepada arahan-arahan pemindahan kerja. (BR Ghaiye dalam *Misconduct in Employment*).

[1a] Jika seseorang pekerja cuba untuk mengingkari sesuatu perintah yang nyata sah atas alasan kepenyalahan undang-undang ianya sukar untuk pengurusan mengekalkan disiplin dan keamanan Perindustrian. Ianya merupakan tugas pekerja untuk pertamanya mematuhi perintah dan kemudian mencabarnya (BR Ghaiye dalam *Misconduct in Employment*).

[2] Pekerja tidak boleh menuntut sebagai suatu hak ketidak-hadiran tanpa kebenaran dan di mana mungkin tidak terdapat sebarang kebenaran baginya. Tidak hadir tanpa sebarang kebenaran adalah suatu perlanggaran disiplin yang keterlaluan. Oleh itu ketidak-hadiran berterusan dari tempat kerja tanpa kebenaran akan menjadi salah laku yang mewajarkan seseorang pekerja dihentikan daripada perkhidmatannya (OP Malhotra on *The Law of Industrial Disputes*).

[3] Perlakuan responden memberikan hak kepada perayu untuk memecatkan beliau. Perayu telah menamatkan kontrak pekerjaan dengan surat pemecatan bertarikh 6 Jun 1989. Dari itu, responden menganggapkan dirinya telah dipecat tanpa kausa dan alasan yang adil. Pemecatan tersebut adalah terlingkung di dalam s. 20(1) IRA 1967. Oleh

itu, masa di bawah s. 20(1) IRA mula berjalan daripada 6 Jun 1989. Akibatnya, representasi-representasi kepada Ketua Pengarah Perhubungan Perindustrian yang diterima pada 21 Julai 1989 telah dibuat dalam lingkungan 60 hari pemecatan sepertimana yang diperlukan di bawah s. 20(1).

[4] Mahkamah telah bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa kegagalan perayu untuk menjalankan suatu siasatan terhadap salah laku responden atas tidak melaporkan diri untuk kerja tidak memudaratkan kerana tiada maklumat tambahan akan dikumpulkan daripada siasatan tersebut dan keputusannya pasti sama kerana salah laku responden adalah nyata dan jelas. Hakim Mahkamah Tinggi yang bijaksana telah juga dengan betulnya memutuskan bahawa forum yang sempurna untuk membangkitkan isu penurunan pangkat adalah Ketua Pengarah Perhubungan Perindustrian selaras dengan s. 20(1) IRA. Juga, responden telah mengambil sikap tidak mempedulikan dan tindakan perayu adalah wajar dalam keadaan tersebut. Jika itu, kesemua pekerja akan tidak hadir di tempat kerja demi untuk memperolehi tuntutan mereka sama ada ianya sah atau tidak sah, dan namun begitu tangan majikan terikat dari mengambil sebarang tindakan tanpa dituduh memecatkan pekerja daripada perkhidmatan beliau.

[5] Mahkamah Perindustrian tidak menunjukkan kesedarannya mengenai otoriti-otoriti yang berkenaan, khususnya petikan-petikan daripada *"Misconduct in Employment"* oleh BR Ghaiye dan *"The Law of Industrial Disputes"* oleh OP Maholtra. Oleh itu Mahkamah Perindustrian telah melakukan kesilapan undang-undang. Ianya adalah juga jelas bahawa keputusan Mahkamah Perindustrian bertentangan dengan undang-undang, logik dan alasan. *Dalam Ernesty Sdn Bhd v. Transport Workers Union & Anor*, telah diputuskan bahawa jika terdapat kesilapan undang-undang dalam award Mahkamah Perindustrian kesilapan sedemikian, sama ada pentafsiran atau sebaliknya, semestinya tanpa bidangkuasa atau melebihi bidangkuasa. Di dalam *R Rama Chandran v. Industrial Court of Malaysia & Anor*, telah diputuskan bahawa sesuatu keputusan boleh dibuka kepada kajian semula kehakiman jika ianya keterlaluan di dalam penentangannya terhadap logik atau standard moral yang telah diterima sehinggakan seseorang yang siuman yang telah memikirkan persoalan untuk diputuskan itu tidak akan mencapainya. Di dalam *Malayan Banking Bhd v. Association of Bank Officers*, telah diputuskan bahawa persoalan ketidak-wajaran adalah berhubung keputusan-keputusan, apabila dilihat secara objektifnya, tidak mempunyai sebarang justifikasi yang munasabah sehinggakan tiada pertubuhan yang munasabah akan mencapainya. Berdasarkan perkara

yang tersebut di atas, mahkamah mendapati keputusan Mahkamah Perindustrian sebagai amat tidak mempunyai justifikasi yang munasabah sehinggakan tiada pertubuhan yang munasabah akan mencapainya. Oleh yang demikian, mahkamah tidak mempunyai alternatif kecuali mengesahkan perintah-perintah yang dibuat oleh hakim Mahkamah Tinggi yang bijaksana.

[Rayuan dibenarkan; deposit dibayar balik kepada perayu.]

Case(s) referred to:
Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(refd)***
Enesty Sdn Bhd v. Transport Workers Union & Anor [1986] 1 MLJ 18 ***(foll)***
London Transport Executive v. Clarke [1981] ICR 355 ***(refd)***
Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia and Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 ***(foll)***
R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***
Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1A)

Employment Protection (Consolidation) Act 1978 [UK], s. 55(2)

Other source(s) referred to:
BR Ghaiye, *Misconduct in Employment*, 2nd edn, pp 306, 712
Dunston Ayadurai, *Industrial Relations in Malaysia – Law and Practice*, 2nd edn, p 168
OP Malhotra, *The Law of Industrial Disputes*, 2nd edn, pp 581, 582

For the appellant - P Mithran; M/s Dass, Jainab & Assoc
For the respondent - N Shanmugam; M/s Shan & Gooi

[Appeal from Court of Appeal; Civil Appeal No: P-02-110-1994]

Reported by Usha Thiagarajah

JUDGMENT

Ahmad Fairuz FCJ:
The respondent was the General Manager of the appellant's office in Penang when he was suspended by the appellant pending investigations into allegations against him. A domestic inquiry found the respondent guilty of eight of them. The appellant, however, did not dismiss the respondent. Instead, the respondent was told to report for work on a demoted rank. He protested. An exchange of correspondence ensued between respondent and appellant. In the meantime, the respondent absented himself from work for a period of 35 days. Consequently, the appellant terminated his employment with the appellant. The

respondent then made representations to the Director-General of Industrial Relations. He contended that he had been dismissed without just cause or excuse. Unable to resolve the dispute, the respondent's representations were referred to the Minister who then referred the matter to the Industrial Court which held that the respondent had been dismissed without just cause or excuse. The appellant then moved the High Court at Penang for *certiorari*. This was granted by the court. The respondent then appealed to the Court of Appeal which allowed the appeal. Dissatisfied with the decision, the appellant applied to this court for leave to appeal and leave was granted. According to the order granting the leave, the following two questions were posed for the determination of this court:

(a) when does time begin to run under s. 20(1) of the Industrial Relations Act 1967, where there has been an abandonment of employment, it being a common fact that the employee had failed to turn up for work for six-seven weeks after his demotion;

(b) is it "dismissal" within the meaning of s. 20(1) of the Industrial Relations Act 1967, where the employer notifies the employee that his service is terminated because he had failed to turn up for work – is it "termination" by the employer or repudiation of contract of employment by the employee.

As to question (a) posed in para. (1) above, the learned counsel for the appellant submitted that the respondent's failure to attend work from 3 May 1989 until 6 June 1989 can be treated as if the respondent had considered himself to have been dismissed and time for purposes of s. 20(1A) Industrial Relations Act 1967 (IRA) began to run from 3 May 1989. Section 20(1A) reads:

> The Director General shall not entertain any representations under subsection (1) unless such representations are filed within sixty days of the dismissal:
>
> Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

And as the respondent's representation to the Director-General was received on 21 July 1989, there is an interval of about 80 days. Thus, the appellant argued, the respondent was out of time when he made the representation. Alternatively, the appellant submitted that the respondent had notice of his demotion a day or two after 12 May 1989, ie, at the latest by 14 May 1989. This is because the letter from the appellant to the respondent dated 12 May 1989 categorically made mention of the respondent's new position as "Manager (General Affairs)". It was argued that if 14 May 1989 is taken as the dismissal

date, then the representation was received seven days late. In the circumstances the appellant contended that there was a violation of an express statutory provision and as such the Industrial Court has no jurisdiction to consider the respondent's representation.

The respondent, on the other hand, contended that the dismissal took place on 6 June 1989. This is because the dismissal letter is dated 6 June 1989. The respondent's representation was received on 21 July 1989. The respondent therefore had taken about 45 days calculated from 6 June 1989 to file his representation. Hence the respondent was well within the time limit set under s. 20(1A).

As to the appellant's alternative argument on the date in issue being 12 May 1989 or 14 May 1989, the respondent urged us to consider 24 May 1989 as the material date. This is because the appellant had on that date written to the respondent stating among other things the following:

> 3. In respect of the fourth paragraph of your said letter, kindly confirm in writing within seven (7) days from the date hereof whether you will abide by the Company's decision arising from the domestic inquiry held recently, failing which the Company shall have no alternative but to deem that you are no longer interested in the employment with the Company.

It was further submitted that the respondent had in fact at the hearing before the Industrial Court said that he considered himself to have been dismissed by this letter of 24 May 1989. It was argued that if this date is accepted then the respondent had made his representation within time.

On this issue, the Court of Appeal said:

> ... The answer to that question must surely be from the moment the workman considers himself to have been dismissed without just cause or excuse. Not a moment sooner. An objective assessment of the facts of a particular case will disclose the point of time at which the workman had, by words or by conduct, considered himself as dismissed. One may then be able to say when the sixty day period fixed by subsection (1A) began.

So, it all depends on the facts of each case:

> Take the case of demotions. A workman in a particular case who suffers a demotion may consider himself to have been dismissed without just cause or excuse. He may treat the demotion as a dismissal. Once he does that, then, he has sixty days from that date to make his representations.

The Court of Appeal then proceeded to summarise the facts of the case. We need only mention the following facts at this juncture:

(a) on 2 May 1989 the appellant wrote to the respondent informing him that the domestic inquiry had found the charges against him to be proven. As such, the respondent had been reduced in rank and was asked to report for duty on 3 May 1989. The respondent, however, did not report for work.

(b) On 12 May 1989, the appellant wrote requesting the respondent to report for duty in his reduced rank. In his reply of 17 May 1989, the respondent stated his reasons for refusing to report for work.

(c) On 24 May 1989 the appellant wrote to the respondent "giving him seven days to state in writing whether he is prepared to abide by the domestic inquiry's decision". The appellant also stated in that letter that if there was no response from the respondent, the appellant would assume that the respondent was "no longer interested in his employment with" the appellant.

(d) On 6 June 1989 the appellant wrote to the respondent "terminating his services on the ground that he is no longer interested in his employment".

(e) On 20 July 1989, the respondent made representations to the Director-General.

After considering, amongst other things, the abovementioned facts, the Court of Appeal said that it was quite obvious that the respondent did not treat the demotion in rank as amounting to a dismissal. The Court of Appeal then stressed that the Minister referred to the Industrial Court the issue of the alleged dismissal of the respondent on 6 June 1989. This is because, according to the Court of Appeal, the respondent had not until 6 June 1989, considered himself as having been dismissed without just cause or excuse. The Court of Appeal then held:

> On the facts of this case, it is beyond question that the 60-day time frame did not commence from the date of the demotion – which was never challenged – but from the date of the impugned termination. It follows that the representations were made within the prescribed time limit. The Industrial Court was accordingly not without jurisdiction to entertain the reference.

The Court of Appeal then quoted *in extenso* the part of the High Court's judgment dealing with this issue of time limit under s. 20(1A). What is clear from the quoted judgment is the fact that the learned High Court judge said:

> ... It cannot be disputed that as soon as the Respondent was notified of his demoted position, the relief of constructive dismissal was available to him under the Act, and he did not avail himself by seeking that relief within the 60-day period in which to make the representation under section 20(1A) of the Act.

> ... In this regard, it was also submitted ... that the calculation of the 60-day period should run from the letter dated 24.5.89 ... which, if so, would bring the Respondent's representation to the Director-General to within the 60-day period. I disagree, as it stands to reason that a representation, being in essence a serious industrial complaint, ought rightly to be made as soon as an employee first had official notice of the employer's act which is the essence of his complaint and which he seeks to impugn. In the current case, this would be when the Respondent received the letter dated 2.5.89 from the Applicant Company requesting him to report for duty on the demoted position of Manager, (General Affairs) on 3.5.89; and at the very latest it should be when the reminder dated 12.5.89 was written to him. On the facts and the admitted chronology of events, I hold that the Respondent was clearly out of time under section 20(1A) of the Act to make his claim for constructive dismissal and it was not before the Industrial Court to make any finding on the matter and neither was it referred to it by the Minister.

On this part of the judgment, the Court of Appeal said that the learned High Court judge had "treated the time postulate under the Act as being inextricably intertwined with the demotion". Hence, the learned High Court judge had held that the sixty-day period was to have commenced from the date when the respondent was notified of his demotion. To the Court of Appeal, the learned judge appeared to have proceeded on the basis that the respondent was obliged to treat his demotion as amounting to a dismissal. Thus, the High Court, according to the Court of Appeal, "was clearly wrong". The Court of Appeal was of the view that the respondent did not consider himself dismissed at the time of the demotion. The respondent had allowed the appellant to reconsider its decision. The Court of Appeal was of the view that the respondent "was arguing with his employer ... that he ought to suffer no demotion".

As to the common fact of the respondent failing to turn up for work for 35 days after his demotion, the learned High Court judge, in his judgment stated:

> It is settled law that ... an employee who leaves his work will be held to have resigned and there will be no dismissal within the meaning of the employment legislation at all.

The learned judge then quoted the following words from the speech of Lord Denning MR in the case of *London Transport Executive v. Clarke* (hereinafter referred to as "Clarke") [1981] ICR 355 at 365:

> ... I would ask this question: can an employee take off – go absent without leave for six months and on returning say to his employer, 'You have not dismissed me. I want my job back.' If the employer refuses to take him back, can the man say, 'By your refusal you have dismissed me. Now I claim for unfair dismissal.' Surely in such a case, by taking off for six months without leave, **the man has dismissed himself**. If this be correct when he takes off

> for six months, it should also be for two months, or as here, for seven weeks. The reason is because it is completely inconsistent with the continuance of his contract that he should take so long a time off. In some cases the employer will have replaced him by some other man or have got his work done by others. In other cases, he may have left his work undone. But whatever it is, the employer cannot reasonably be expected to take him back. **The man will himself have terminated his contract of employment.** (emphasis added)

After setting out the duties of the Industrial Court under s. 20 IRA, the learned judge, at p. 24 of his judgment (p. 100 of the Appeal Record (AR) said:

> In the matter before me, after the Respondent was found guilty of several charges against him, and the Board of Inquiry's recommendation that he be demoted to the position of Manager (General Affairs) was implemented *vide* the letter dated 2.5.89 to him, the Respondent had the option at that point in time of his receipt of the letter dated 2.5.89, to refer the matter to the Director General, since he was unhappy about the composition of the panel of inquiry resulting in his demotion. Instead, he stayed away from work. The act of being absent is itself a misconduct on the part of the Respondent. ... Indeed, it is the act of the Respondent by staying away from work, which evinces an intention of not wanting to continue his employment with the Applicant thereby repudiating the Contract of Employment. This being so, the letter of the Applicant dated 6.6.1989 ought to be taken as an acceptance of the repudiation and/or a termination of the Contract of Employment, when considered in the light of the *London Transport Executive* case. **Thus, I held** that the Applicant Company did not dismiss the Respondent, who by his failure to report to work had dismissed himself, and the question of whether 'dismissal was without just cause or excuse by his employer' did not arise. (emphasis added)

The Court of Appeal, in reference to the speech of Lord Denning that was quoted by the learned judge in his judgment, said:

> There are three comments we would make upon the view expressed by Lord Denning in the foregoing passage.
>
> First, the United Kingdom legislation under which *Clarke (supra)* was decided differs from the Act in material respects. The Supreme Court in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd. (supra)* recognised this and said so. We must therefore be very careful when we refer to English cases in this area of the law. We must on no account be swayed by them when interpreting section 20(1) of the Act.
>
> Second, while the ordinary principles of common law relating to the discharge of a contract of service by repudiation and acceptance may continue to apply under the United Kingdom statute, they are wholly irrelevant to a case under section 20(1) of the Act. Industrial adjudication is not concerned with the technicalities that form part and parcel of the common law doctrine of repudiation. Indeed, section 30(5) of the Act expressly declares that the Industrial Court

shall act accordingly to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

... This brings us again to the decision in *Wong Chee Hong v. Cathay Organisation (M) Sdn. Bhd.* [1988] 1 CLJ 45; ([1988] 1 CLJ (Rep) 298) in particular, to the passage in the judgment of Salleh Abas LP, which we have reproduced earlier. The learned Lord President there said that the word "dismissal" in section 20 of the Act must be interpreted according to its meaning in common law. He referred to *Bouzourou v. The Ottoman Bank* [1930] AC 271, which was a case of wrongful 'dismissal at common law. But we are not here dealing with a case at common law. And it is noteworthy that in a later decision, the Privy Council has recognised the wider scope of industrial adjudication to cover cases where an employer has done no more than exercise his legal rights. See, *United Engineering Workers Union v. Devanayagam* [1967] 2 All ER 367, per Viscount Dilhorne at p. 371. ...

This Court has, in *Hong Leong Equipment Sdn. Bhd. & Anor. v. Liew Fook Chuan (supra)*, held that the very purpose for which Parliament passed the Act and the several amendments thereto was to mitigate the rigours of the common law and the doctrines of equity in their application to the relationship between an employer and his workman. It is therefore too late in the day to try and interpret the Act to keep it in line with the common law doctrines that apply to a breach of contract. It follows that the remarks of Lord Denning in *Clarke* have no application to a case under the Act.

Thirdly, it is noteworthy that although Lord Denning concurred in the final result, his views formed the minority view. The other two members of the English Court of Appeal (Templeman and Dunn LJJ) differed from the Master of the Rolls when it came to the reasons for allowing the appeal. The learned judge in the present case unfortunately failed to notice this important matter. In any event, later English cases have refused to apply the theory of 'self-dismissal' propounded by Lord Denning in *Clarke*. See *Pendlebury v. Christian Schools North West Ltd.* [1985] ICR 174.

At p. 33 of its judgment, the Court of Appeal concluded that the learned High Court judge had wrongly relied "on the common law principles governing the repudiation of a contract and his acceptance of the so-called doctrine of self-dismissal stated by Lord Denning in *Clarke*" when he quashed the Industrial Court's award.

In *Wong Chee Hong (supra)* the Supreme Court pointed out that s. 20 IRA is entirely different from para. (c) of s. 55(2) of the United Kingdom Protection of Employment Act 1978. Hence the Supreme Court, at p. 49 of the report, said:

> ... Therefore we cannot see how the test of unreasonableness which is the basis of the much advocated concept of constructive dismissal by a certain school of thought in U.K. should be introduced as an aid to the interpretation of the word 'dismissal' in our section 20. **We think that the word 'dismissal' in this section should be interpreted with reference to the common law principle.** Thus it would be a dismissal if an employer is guilty of a breach which goes to the root of the contract or if he has evinced an intention no longer to be bound by it. In such situations, the employee is entitled to regard the contract as terminated and himself as being dismissed. (See *Bouzourou v. The Ottoman Bank and Donovan v. Invicta Airways Ltd.*)
>
> In *Bouzourou*'s case an employee would have been entitled, according to the Privy Council, to regard himself as being dismissed if his transfer from one province to another province rendered him exposed to an immediately threatening danger of violence or disease to his person. An in *Donovan*'s case, the Court of Appeal held that when the conduct of the employer was such that it rendered the continuance of the employee's service impossible, the latter was entitled to treat the contract as at end and to obtain damages for wrongful dismissal. (emphasis added)

And earlier on, at p. 46 of the report, the Supreme Court said:

> The case, we were told, raises an important question of law as to whether or not the doctrine of constructive dismissal is applicable in the interpretation of section 20 of our Industrial Relations Act 1967.

And the appeal now before us, as in *Wong Chee Hong*, is one that pertains to s. 20 IRA. As such we see nothing wrong in applying the common law principles to the issue of dismissal in the appeal now before us. That is what, after all, the Supreme Court did in *Wong Chee Hong*.

As to the common law principles, Lord Denning MR in *Clarke*, at p. 362 of the report, said:

> It is over 50 years ago now that I studied in depth the common law relating to the discharge of contract by breach or by incapacity or by repudiation. The result is to be found in *Smith's Leading Cases*, 13th ed. (1929), Vol. II, pp. 46-56. I adhere to what I then said. ... But a *repudiatory breach is better described as a "fundamental breach" or a "breach going to the root of the contract". Such a breach may well lead to the discharge of a contract without any need for acceptance.* The classic instance is where a singer genuinely fell ill and could not attend the rehearsals. Her incapacity discharged the theatre from further performance, without any talk of acceptance. It would be just the same if she had not really been ill but had pretended to be ill and thus been guilty of a breach going to the root of the contract. Again the contract would be discharged without any talk of acceptance. (emphasis added)

At p. 363 of the report, Lord Denning referred to one group of cases wherein: *a*

> ... the misconduct of the employee is such that it is completely inconsistent with the continuance of the contract of employment. So much so that the ordinary member of the tribunal would say of him: 'He sacked himself'. In these cases it is the employee himself who terminates the contract. **His misconduct itself is such as to evince an intention himself to bring the contract to an end.** Such as when an employee leaves and gets another job, or when he absconds with money from the till, or goes off indefinitely without a word to his employer. If he comes back and asks for his job back, the employer can properly reply: "I cannot have you back now." There is no election in that case. The man dismisses himself. In the words of Shaw LJ in *Gunton v. Richmond-upon-Thames London Borough Council* [1980] ICR 755, 763, there is a 'complete and intended withdrawal of his service by the employee'. (emphasis added)

b

c

In the appeal before us, the evidence, as pointed out by the Court of Appeal, do not go to support an intention on the part of the respondent to bring his contract to an end. As said by the Court of Appeal in its judgment, the respondent, in a series of correspondence between him and the appellant, was arguing with the appellant that he ought to suffer no demotion. (The respondent's letter of 27 May 1989 to the appellant referred to by the Industrial Court in its award supports this view of the Court of Appeal.) As such the respondent's misconduct cannot be one which is sufficient to discharge his contract without any need for acceptance. Hence time cannot run from 3 May 1989, the date when the respondent began to absent himself from work. At this juncture, we find it useful to again refer to p. 363 of the report of *Clarke* wherein Lord Denning said:

d

e

f

> Under our modern legislation a new question arises. It arises under section 54 of the Employment Protection (Consolidation) Act 1978, re-enacting earlier sections going back to 1971. When an employee is dismissed for misconduct, we have to ask – and to answer – the question: **who "terminates" the contract?** If the employer terminates it, it is taken to be unfair unless the employer proves that it was fair. But, if the employee terminates it by his own misconduct, he gets nothing.

g

> **Much difference of opinion** has been evoked **amongst the judges on that question** under the Act. So much so that **I feel it is desirable for this court to afford some guidance. I think it is best done by applying the common law principles** which I have just stated. The cases fall into two groups ...

h

> ... The second group is where **the misconduct** of the employee **is bad enough to justify the employer at common law in dismissing him, but leaves it open to the employer whether to dismiss him for it or not.** His misconduct is such as to show that he is not going to fulfil his duties as he ought to do: but nevertheless it is not such as to be entirely disruptive of the contract. He does

i

> not sack himself, but he is guilty of a breach which entitles the employer at common law to dismiss him. **If the employer does elect to dismiss him, it is the employer who terminates the contracts.** (emphasis added)

Dunston Ayadurai, in his book "*Industrial Relations in Malaysia – Law and Practice* (2nd edn)" at p. 168, has this to say on "termination and dismissal":

> The term "termination" in industrial law really refers to the termination of the employment relationship, but as this relationship is a contractual one here, it is usually identified with the termination of the employment contract. The contract may be terminated by the employer (when he retrenches, for example) or by the employee (for instance, when he resigns) or even by an event (such as age or death). There may be any number of reasons for its termination. However, **where the contract is terminated by the employer because of the perceived misconduct** of the employee, then – whatever the reason given by the employer for the termination of the employee – **the termination is termed a 'dismissal'**. ... **Nevertheless, whether simply a termination or a dismissal for misconduct, the effect is the same, *viz* the termination of the contract.** (emphasis added)

The learned Chang Min Tat FCJ, when delivering the judgment of the Federal Court in *Dr. A. Dutt v. Assunta Hospital* [1981] 1 MLJ 304, at p. 312, said:

> ... It further follows that on a proper interpretation of the relevant sections of the Act, **there is no material distinction between dismissal and termination. Either must be with just cause or excuse to be justifiable;** otherwise the Industrial Court may make an award ... (emphasis added)

We had shown, earlier on, that the respondent's misconduct was one that did not evince an intention on the part of the respondent to bring his contract to an end. What is clear from the evidence tendered before the Industrial Court is a misconduct which obviously show that the respondent, in the words of Lord Denning in *Clarke*, "is not going to fulfil his duties as he ought to do". It is to be noted that the demotion was made, unlike in the case of *Wong Chee Hong (supra)*, after a domestic inquiry was duly held. The respondent was notified to report for duty on the demoted position. And he never did. In his letter of 27 May 1989 addressed to the appellant, the respondent, *inter alia*, said:

> With reference to your letter dated 2nd May 1989 wherein you inform me that I am demoted from my position of General Manager to Manager (General Affairs) with a much reduced salary and the withdrawal of my existing benefits, I am to inform you I cannot accept your arbitrary decision, for if I do, it would appear that I accept my guilt, which in actual situation I am **NOT** guilty of any allegation made against me by the newly appointed Senior General Manager of PanGlobal Textile Bhd., Mr. Tan Kai Swee. There is absolutely

no justification on your part to demote me when there is no proof at all of any guilt on my part. ... I am sad to say that you took action without proof of any wrong doing on my part. ...

... I am also to inform you that at the very beginning of the Inquiry, I had raised objections to the composition of the Panel Members, but on account of your assurance in your letter dated 15th February, 1989, I had co-operated fully in bringing the inquiry to an early conclusion.

These statements of the respondent clearly show his disagreement and dissatisfaction with the appellant's action of demoting him and hence his disregard of the appellant's order to report for duty. B.R. Ghaiye, in his book *"Misconduct in Employment"* (2nd edn), at p. 306, said:

22. Whether an employee is required to obey orders if it is doubtful whether the orders are legal or not

It is generally held that the proper course for an employee is to obey the orders when it is given and protest about its illegality in separate proceedings. The distinction is made on the basis that if it is allowed to a worker to judge about the legality of every order and to disobey it, if he thinks it is not legal, it would be impossible for the management to get the work done. (*Rashtriya Girni Kamgar Sangh v. Genda Lal Mills Co.*, [1951] ICR 603 (IC); *Kalyanbhai Millji Bhai v. New National Mills Co. Ltd., Ahmedabad* [1957] ICR 1052 (IC); *B.M. Kastura v. Swadeshi Mills Co., Ltd.*, [1973] ICR (IC). If an employee takes upon himself to disobey an order which he thinks not lawful or unreasonable, two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried out, he can do the work and take up the matter through the union. If he disobeys he must take the risk, if the court finds that the order was lawful and reasonable. (*R.M.M.S., Bombay v. Phoenix Mills Ltd.*, [1958] ICR 154 (IC)). When a worker refused to comply with the instructions of his superiors and his defence was that he wanted to verify whether the order was approved by the Manager. It amounted to insubordination and dismissal is justified. (*Cambodia Mills Ltd., Coimbatore v. Industrial Tribunal, Madras* [1959] 11 LLJ 80 (Mad HC). The above principle also applies to transfer orders. If an employee tries to disobey apparently lawful order on the ground of illegality it would be difficult for the management to maintain discipline and industrial peace. It is the duty of the employee to first obey the order and then challenge it. (*Abdul Latif v. New Prakash Transport Co., (Pvt.) Ltd.*, [1974] ICR 1 (IC). (emphasis added)

And as to absence of employee without permission, B.R. Ghaiye, at p. 712 of the same book, said:

No employee can claim as a matter of right leave of absence without permission and when there might not be any permission for the same. Remaining absent without any permission is, therefore, gross violation of discipline ... (emphasis added)

OP Malhotra in his book "*The Law of Industrial Disputes*" (2nd edn.), at p. 581-582, said:

> No employee can claim leave of absence as a matter of right, and *remaining absent without leave will itself constitute gross violation of discipline. Hence, continued absence from work without permission will constitute misconduct justifying the discharge of a workman from service;* (emphasis added)

In the context of the above-quoted authorities, we are of the view that the respondent's misconduct entitled the appellant, in the words of Lord Denning in *Clarke*, "at common law to dismiss him". And again, in the words of Lord Denning in *Clarke*, the appellant "terminates the contract" when he elects to dismiss the respondent. Bearing in mind what Dunston Ayadurai said in his book (quoted above), we hold the view that the termination by the appellant is a dismissal within the meaning of s. 20(1) IRA. This also answers question (b) in para. (1) above. And, as stated by the Court of Appeal, the respondent **considered** himself to be dismissed without just cause or excuse when his employment was terminated by the appellant. We agree. The termination letter is dated 6 June 1989. In the circumstances, time, under s. 20(1), has to begin to run from 6 June 1989. Consequently the representation was made within time. This is also the answer to question (a) in para. (1).

Having answered both the questions referred to us in this appeal, it now remains for us to consider the issue of whether the dismissal was with just cause or excuse *(Dr. A. Dutt (supra))*. The Industrial Court (IC) in its award had found that:

(a) the respondent had been summarily terminated for the misconduct of failing to report for duty to a demoted position as decided by the appellant;

(b) the appellant did not conduct any disciplinary proceedings as regards that misconduct of the respondent;

(c) the respondent was not asked to explain as to why he had failed to report for duty in compliance with the appellant's decision;

(d) the respondent was not given the right to be heard;

(e) the appellant had failed to make an inquiry before terminating the service of the respondent;

(f) the appellant had not called Dato' Mak Kok, the managing director of the appellant to justify the downgrading of the respondent;

(g) the appellant had not called the Chairman of the panel of inquiry and produce the findings of the panel, to convince the IC that the respondent had been properly downgraded and therefore the respondent has no justification in refusing to comply with the appellant's order to report for duty.

The learned High Court judge had on the other hand formed the view that the appellant's failure to conduct an inquiry into the misconduct of the respondent in not reporting for work is not fatal. At pp. 29 and 30 of his judgment, the learned High Court judge said:

> ... there would be no additional information which would be gathered from the inquiry and the decision would have been the same, as the misconduct of the Respondent is clear and not unambiguous. Furthermore, had an enquiry been held the Respondent would have raised the issue of demotion, and this would not be the proper forum for the Respondent to do so, considering that the proper forum under the law to raise such issue and to lodge his complaint, would be to the Director-General pursuant to Section 20(1) of the Industrial Relations Act, 1967. The Respondent had adopted an attitude of indifference. Would not the action of the Employer in such circumstances be justified? Yes, it would, as otherwise all employees will stay away from work to win their demand whether valid or invalid, and yet tie the hands of the Employer from taking any action without being accused of having dismissed the employee from his employment.

We agree with the learned High Court judge; more so when considered in the light of the authorities referred to in para. 8 above. There is nothing in its award that can indicate its awareness of those authorities – in particular the excerpts from B.R. Ghaiye's *"Misconduct in Employment"* and O.P. Malhotra's *"The Law of Industrial Disputes"*. In this sense, the IC had committed an error of law. It is also obvious that, in the circumstances, the findings of IC enlisted above fly against law, logic and reason. Mohamed Azmi SCJ, in *Enesty Sdn Bhd v. Transport Workers Union & Anor.* [1986] 1 MLJ 18, at p. 24, said:

> ... In other words, **if there is an error of law** on which the award of the Industrial Court is founded, **such error** whether of interpretation or otherwise **must necessarily be without jurisdiction or in excess of jurisdiction.** Any decision in any award based on an invalid interpretation or construction of the law must surely be a nullity, and this must be construed as a nullity resulting from the Industrial Court doing or failing "to do something in the course of the inquiry which is of such a nature that its decision is a nullity" as referred to by Lord Reid at page 171 in *Anisminic*'s case, or the Court 'having asked themselves the wrong question' as referred to be Lord Diplock at page 187 in *In re Racal Communications Ltd.* (emphasis added)

In the case of *R. Rama Chandran v. Industrial Court of Malaysia & Anor.* [1997] 1 CLJ 147, Edgar Joseph Jr. FCJ at p. 172 of the report:

> But, Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the Courts to scrutinise such decisions not only for **process,** but also for **substance.**
>
> In this context it is useful to note how Lord Diplock defined the three grounds of review, to wit, (i) **illegality,** (ii) **irrationality** and (iii) **procedural impropriety**. This is how he put it:
>
> > By 'illegality' as a ground for judicial review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of a dispute, by those persons, the Judges, by whom the judicial power of the state is exercisable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as **'Wednesbury unreasonableness'** (see *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* ([1948] 1 KB 223). It applies to **a decision which is so outrageous in its defiance of logic** or of accepted moral standards **that no sensible person who had applied his mind to the question to be decided could have arrived at it.** Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14, of irrationality as a ground for a Court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision-maker. **'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.** (emphasis added)

At p. 176 of the report, the learned judge continued thus:

> According to *Halsbury*, 4th edn. vol. 37 para. 567, the process of judicial review is that: "... by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior Courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.

And at p. 182, the learned judge said:

> There are also Indian Supreme Court authorities which strongly support the proposition that the power of the Courts there, in the field of public law remedies, is not limited, as in England, but much wider, so much so, that in certain circumstances, they have the power to review the decision of the authority on the merits and mould the relief according to the exigencies of the situation in order to satisfy the insistent demands for justice. (See for example, *State of Madhya Pradesh v. Bhailal Bhai* AIR [1964] SC 1006; *Dwarka Nath v. Income Tax Officer,* AIR [1966] SC 81; *Baldeo Prasad v. Commissioner Jhansi Division* [1967] 63 ITR 55; *Hindustan Steel Ltd. Rourkela v. Roy AK* AIR [1970] SC 1401, 1407; *Variety Emporium v. Mohd. Ibrahim* AIR [1985] SC 207, 210).

E. Abdoolcader SCJ, in *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia and Industrial Court* [1988] 1 CLJ 276; ([1988] 1 CLJ (Rep) 183), at p. 279 (at p. 186) said:

> I should perhaps pause here to refer to my judgment in this regard in *Tanjong Jaga Sdn. Bhd. v. Minister of Labour and Manpower & Anor.* [1987] 1 MLJ 124 where in dealing with the question of unreasonableness I alluded (at pages 129-130) to Lord Diplock's exegesis in *Bromley London Borough Council v. Greater London Council & Anor.* [1983] 1 AC 768 (at page 821) in regard to decisions that, looked at objectively, are so devoid of any plausible justification that no reasonable body of persons could have reached them, and it would not perhaps be amiss to refer in this context to Dunn L.J.'s assertion in *Regina v. Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337 (at page 1352) that 'The categories of unreasonableness are not closed ...' Mason J said in *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd.* [1986] 66 ALR 299 (at page 310) that it might be possible to challenge a decision which has
>
> > failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable" ... (A) (emphasis added)

In the light of the above-quoted excerpts from *Enesty, R Rama Chandran* and *Malayan Banking*, the decision of the IC, without its consideration of the above-quoted excerpts from B.R. Ghaiye's and OP Malhotra's books in particular, in the words of E. Abdoolcader SCJ in *Malayan Banking*, is "so devoid of any plausible justification that no reasonable body of persons could have reached them". As such we are left with no alternative except to confirm the orders made by the High Court judge. The appeal is hereby allowed with costs. Deposit to be refunded to the appellant.